

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

WILMER LOUIS SPENCE, JR.,

PETITIONER

V.

NO. 1:04CV390-M-D

JOE THORNTON, et al.,

RESPONDENTS

**ORDER WITHDRAWING PREVIOUS ORDER AND
ADOPTING REPORT AND RECOMMENDATION**

The *pro se* Petitioner, an inmate, brings this petition pursuant to 28 U.S.C. § 2254. When this motion was filed Petitioner's case had never been considered on direct appeal by the Mississippi Supreme Court or the Mississippi Court of Appeals. Since the initiation of this petition, the trial court granted Petitioner a motion for an out-of-time appeal and appointed counsel to represent him on direct appeal. Respondents suggested and Magistrate Judge Jerry A. Davis recommended on September 22, 2006, that this petition be dismissed as moot in light of the pending appeal in state court. On October 10, 2006, Petitioner filed an Objection to the Report and Recommendation providing the court with an order from the trial court withdrawing the permission for an out-of-time appeal and releasing counsel. Based on this showing, this court declined to adopt the Report and Recommendations and ordered the Respondents to file a brief addressing the circumstances created by the trial court's actions. The Respondents brief now shows that the trial court has set aside its order withdrawing permission for the out-of-time appeal and release of counsel. Further, the trial court reinstated permission for Petitioner's out-of-time appeal and his appointment of counsel.

In light of these recent events, the court withdraws its prior order dated February 28, 2007, declining to adopt the Report and Recommendations. Since the Petitioner may now proceed with his state court appeal with competent counsel, the court is of the opinion that the Magistrate Judge's Report and Recommendation should be approved and adopted as the opinion of the court. Therefore, it is

ORDERED:

1) the court's order dated February 28, 2007, declining to adopt the Report and Recommendations, is WITHDRAWN;

2) the Report and Recommendation of the United States Magistrate Judge dated September 22, 2006, is hereby approved and ADOPTED as the opinion of the court;

3) the petition is DISMISSED without prejudice; and

4) this matter is CLOSED.

THIS the 4th day of April, 2007.

/s/ Michael P. Mills
UNITED STATES DISTRICT JUDGE